Nos. 80-757, 80-895, 80-936

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-757

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER and ALFRED PENNISI,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

No. 80-895

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

No. 80-936

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONDENTS'* COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1) Whether a private cause of action exists under the Commodity Exchange Act for persons victimized by violations of that act by both registered and non-registered persons acting in concert?

2) Whether a private cause of action exists against a contract market which fails to prevent broad market manipulations by both registered and non-registered persons?

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* None of the respondents in these cases need make any statement pursuant to Rule 28(1).

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STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited by petitioners, the following provision is involved:

> § 2(a)(1), 7 U.S.C. § 2:
>
> Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or of any State.

STATEMENT OF THE CASE

Petitioners'[1] statements of the case are accurate, as far as they go. However, a few additional facts are nonetheless necessary to put the issues before the Court into perspective.

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[1] By permission obtained from this Court's Clerk's office granted orally in a telephone conversation on December 31, 1980, respondents are filing one response to all of the petitions for certiorari in New York Mercantile Exchange v. Leist, (hereinafter "Exchange") No. 80-757, Clayton Brokerage Co. of St. Louis, Inc. v. Leist (hereinafter "Clayton") No. 80-895, and Heinold Commodities, Inc. et al. v. Leist (hereinafter "Heinold") No. 80-936.

Respondents dealt directly with each of petitioners-brokers, but they "are not," in the words of Judge Friendly, "complaining about the handling of their accounts but rather of broad market manipulation." (A-70, n.35).[2]

The prime movers in this scheme were J.R. Simplot (hereinafter "Simplot") and P.J. Taggares (hereinafter "Taggares")[3] who are "persons" not registered with the CFTC. Simplot was fined $90,000 by the Commodity Futures Trading Commission (hereinafter "CFTC") and prohibited from trading in futures contracts for six years

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[2] Page references are to the Appendices to the petitions for writ of certiorari, No. 80-757, No. 80-895 and No. 80-936. Since all bear the same pagination, all references are simply to "A_____." References to the Joint Appendix to the Supplemental Briefs are cited as "JA____."

[3] Simplot and Taggares are the two largest potato processors in the United States, using well over 35 million hundredweight of potatoes annually or about 50% of the nation's yearly harvest. Simplot and Taggares had virtually destroyed the Idaho potato contract on the Chicago Mercantile Exchange in 1971 using methods similar to those they employed with the Maine potato contract on petitioner Exchange in 1976 - the subject at bar.

and Taggares was fined $15,000 by the CFTC and barred from trading in futures contracts for four years as a result of their manipulation of the potato futures market (A-108,n.2). (Mansfield, J. dissenting) All of respondents' claims for relief are asserted against Simplot and Taggares as well as the petitioners-brokers.

It is therefore surprising - but, as we show, readily explainable - that all petitioners carefully avoid discussion of Simplot and Taggares, the non-registered persons who conspired with petitioners-brokers to manipulate the 1976 Maine potato futures contract market.

Simplot and Taggares did not join in the motion to dismiss made by the petitioners, and have not sought review in this court. As Judge Friendly observed (A-67), although "probably the principal defendants[,] in these actions . . . they [Simplot and Taggares] have understandably chosen to stay in the background in the present argument . . ."

Petitioner Exchange has assessed hundreds of thousands of dollars in penalties against the petitioners-brokers for their failure to comply with Exchange Rules. The brokers were indemnified by

Simplot and Taggares for these fines pursuant to a written agreement.

As of the writing of the opinion below, the CFTC was continuing its investigation of the manipulation of the 1976 Maine potato futures market. (A-108 n.2)(Mansfield, J. dissenting).

SUMMARY OF ARGUMENT

The Court should deny all three petitions for writs of certiorari in these cases because:

1) This case is not in a proper posture for review. Defendants Simplot and Taggares, both "non-registered persons", decided not to participate in the motion to dismiss made in the District Court, and they did not participate in the appeal, nor as yet, in the review process at bar. They are, therefore, not before this Court. In their absence, this Court cannot resolve all of the questions about private rights of action arising under the Commodity Exchange Act (hereinafter "CEA") 7 U.S.C. § 1 et seq.

2) The majority opinion below correctly found the existence of a private right of action under the CEA after a careful analysis of this Court's recent decisions and the legislative history. To begin with, this Court has not barred all implication of remedies and there is thus no conflict merely because the Court below implied such a remedy. The legislative history as a whole shows that Congress in 1974 knew that private causes of action

existed under the CEA, and that Congress assumed that this interpretation of the CEA would continue. Congress made changes in the statute reflecting this understanding and, indeed, included language designed to protect private causes of action. Elimination of the cause of action in commodities cases, but not securities cases, would destroy the symmetry Congress created between the two.

3) The dire consequences predicted by the petitioners if the decision below is permitted to stand are not supported by the experience of the courts to date. The cases which have been brought until now are not strike suits, but are brought to the courts because of inadequacies in the agency enforcement process.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE PRINCIPAL DEFENDANTS ARE NOT BEFORE THIS COURT

As Judge Friendly noted (A-67), "the principal defendants" in this case are not the petitioners, but Simplot and Taggares who illegally manipulated the 1976 Maine potato futures market for their own pecuniary advantage. They nevertheless did not join in the motion to dismiss but "stayed in the background" (A-67), despite their obvious interest in that motion. Whether or not by agreement with the petitioners, Simplot and Taggares are thus not before this Court. As a result of their decision, as Judge Mansfield conceded in dissent (A-109, n.3), a determination that no cause of action exists against the petitioners would not resolve the question of the liability of Simplot and Taggares under the CEA, particularly because, as non-registered persons, § 4d, 7 U.S.C. § 6d and § 4e, 7 U.S.C. § 6e, they are not subject to the reparations procedure provided for in § 14, 7 U.S.C. § 18.

Hence a judgment in favor of the petitioners would only require the District Court, and subsequently the Court of Appeals and this Court, to undertake the implication analysis once again. Simplot and Taggares should not be permitted, by their refusal to participate in the orderly resolution of this case in this Court at this time to impose that heavy burden on the courts and on the respondents. Because of Simplot's and Taggares' actions this case is not in an appropriate posture for review, and for this reason, the writs of certiorari should be denied.

A denial of certiorari in these cases would not cause any delays which would unfairly benefit respondents, who are seeking a recovery for sums lost in what has been rightly termed the "notorious Maine potato futures default," Wachovia Bank and Trust Company v. National Student Marketing Corp., ___F.2d ___, [Current] Fed. Sec. L. Rep. (CCH) ¶97,712 at p.98, 736 (D.C. Cir. 1980) (hereinafter "Wachovia").

As the motion for partial summary judgment was made on the eve of trial, should this Court deny certiorari, a trial could be held promptly. If a trial results in a judgment for respondents on their claims under the CEA, the petitioners, Simplot and Taggares would be free to seek, after an appeal to the Second Circuit, review in this Court. At that time, all of the questions about implied causes of action under the CEA present in this case could be considered.

II. THE COURT BELOW CORRECTLY APPLIED THIS COURT'S DECISIONS TO THE CEA

A. No Conflict Is Created Merely Because A Private Cause Of Action Was Implied By The Second Circuit.

The crux of the petitions for certiorari is that the decision below "conflicts in principle with the decisions in this Court", petition of Exchange, No. 80-757 at 9; petition of Clayton, No. 80-895 at 8; petition of Heinold, No. 80-936 at 11. As a second reason for granting the writ petitioners point to the conflict between the decision below and that of the Fifth Circuit in Rivers v. Rosenthal & Co., _____ F.2d _____, No. 79-1313 (5th Cir., December 16, 1980), reproduced in the Joint Appendix to the Supplemental Briefs in support of the petitions for writs of certiorari. As we demonstrate in Point I, supra, this case is not an appropriate vehicle for resolution of that conflict. In any event it is respectfully submitted that it is Rivers v. Rosenthal & Co., supra, not this case which is incorrectly decided, and which merits review by this Court.

Neither the court below, nor the Sixth Circuit in Curran v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980), petition for certiorari pending, No. 80-203, perceived any conflict between implying a private cause of action under the CEA and this Court's decisions.

Two other circuits have reached the same result since the 1974 amendments to the CEA. Both treated the issue as so simple and well settled as not to merit extensive discussion, Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Goldman, 593 F.2d 129 (8th Cir.) cert. den., 100 S.Ct. 76 (1979); Hirk v. Agri-Research Council, 561 F.2d 96 (7th Cir. 1977).

One other Circuit, albeit in dicta, has indicated its approval of Judge Friendly's reasoning and holding in this case. Wachovia, supra.[4]

A "conflict in principle" with this Court's decisions is not created because a majority - but not all - of this Court's

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[4] A majority of the District Courts that considered the question likewise found a private cause of action under the CEA; compare. The cases are collected in Judge Friendly's opinion (A-43,44 n.19).

recent and relevant decisions refused to imply a private cause of action under various federal statutes and the decision below did. Wachovia, supra, at p.98,736 This Court's decisions do not state a general rule against implying a private cause of action; As Judge Mikva put it, this "Court did not announce that it was going out of the business" of implying remedies from federal statutes. Wachovia, supra, at p. 98,732; Accord, Cannon v. University of Chicago, 441 U.S. 677 (1979) (hereinafter "Cannon"); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (hereinafter "Transamerica").

B. The Court Below Was Correct In Analyzing The Legislative History In Light Of What The Congress Thought In 1974.

This Court's cases, of course, do hold, as the Court below recognized, that whether a private cause of action is to be implied from a federal regulatory statute, is "basically a matter of statutory construction", Transamerica, supra, 444 U.S. at 15, although the three other factors enunciated in Cort v. Ash, 422 U.S. 66 (1975) must also be considered.

The necessary Congressional intent need not be explicit, but "may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment". Transamerica, supra, 444 U.S. at 18. No doubt, in view of subsequent case law developments, it would have been preferable for Congress to have explicitly stated that it recognized the existence of a private cause of action under the CEA, but that is not the relevant inquiry. Cannon, supra, 441 U.S. at 718. (Rehnquist, J., concurring).

This Court's emphasis on the importance of Congressional intent in determining whether to imply a private cause of action, Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979), means that the legislative materials must be analyzed, not with hindsight, but, as the majority below recognized (A-45,46), in light of what Congress must have thought at the time. As the Fifth Circuit conceded in Rivers v. Rosenthal & Co., supra (JA-29):

> [T]he liberal judicial climate in which the CFTCA was born requires us to be more solicitous and sensitive to indications of Con-

> gress' desire to create a cause of action. Indeed, any indication that Congress actually intended merely to leave the question to the judiciary to be resolved according to its contemporary rules of construction, while clearly inadequate under current standards, would likely be sufficient to carry the day here.

C. Congressional Intent To Allow A Private Cause Of Action Appears Clearly In the Legislative History.

In the case of the CEA, however, there is far more than merely a Congressional intent to leave the matter to the judiciary. The legislative history affirmatively demonstrates a Congressional intent to allow private causes of action under the CEA. This intent appears from the explicit language of the act, and the circumstances surrounding the most recent amendments to it. Because these circumstances are particularly significant and because they are remarkably similar to the situation in Cannon, supra, we begin with them.

The 1974 revisions were embodied in P.L. 93-463, 88 Stat. 1389, which was described as "An Act to amend the Commodity Exchange Act to strengthen the regulation

of futures trading..."(emphasis added). In view of the recognition of private causes of action prior to 1974, it would be surprising if Congress, in enacting "An Act to Amend the Commodity Exchange Act to strengthen the regulation of futures trading" would sub silentio eliminate the private cause of action. It would be particularly surprising given the steady strengthening of the CEA since its enactment in the early 1920's.

There was no reason for Congress to doubt in 1974 that a private cause of action existed under the CEA as it then existed. All the lower Federal courts which had considered the question had so held (A-38,39). An expert witness testifying before Congressional committees considering the CEA amendments also advised Congress that a private right of action existed (A-61).

It matters not that petitioner Heinold, No. 80-936, in its petition for certiorari at 18-25, with the benefit of hindsight, suggests that all those cases which had implied a private cause of action were "wrongly" decided, or were "illegitimate" under the law governing the implication of remedies as it then stood.

Congress is not a super law review, which must pass on the correctness of court decisions before relying on them. Congress properly assumes that the decisions of a majority of the Federal courts are correct and represent an accurate exposition of the law. "For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." Cannon, supra, 441 U.S. at 711, citing Brown v General Services Administration, 425 U.S. 820, 828 (1976).

Congress did not rely on lower court decisions alone. Shortly before Congress began its consideration of the 1974 revisions, this Court, in Chicago Mercantile Exchange v. Deaktor, 414 U.S. 113 (1973), although not passing directly on the existence of a private cause of action, could surely be understood as accepting the existence of a private cause of action. Cf. Cannon, supra, 441 U.S. at 702, n.33.

The decisions of this Court establish that, when Congress re-enacts a statute, it is entitled to assume that prior case law interpreting unchanged portions of the statutes will continue in force, Lorillard

v. Pons, 434 U.S. 575, 580-81 (1978). The Rivers court, while acknowledging the Lorillard rule, found that the CEA did not fit this pattern, because the 1974 amendments involved a wholesale revamping of the Act. As a result, it placed the burden on the plaintiff to prove that Congress, in 1974, took some affirmative step to create the private cause of action. But this approach cannot explain away the fact that § 4b, 7 U.S.C. § 6b, was left unchanged, and that nothing in the legislative history indicates that Congress (as opposed to industry spokesmen) wanted to change the law. Moreover, as we demonstrate infra at 13-14, Congress indeed manifested an intent to preserve prior case law.

Even more importantly, the major anti-fraud provision of the CEA, § 4(b), was modeled on § 10(b) of the 1934 Securities and Exchange Act. Private causes of action were firmly entrenched under the latter statute, J.I. Case Co. v Borak, 377 U.S. 426 (1964). Judge Friendly argued (A-34, n.14):

> "The 1936 amendments arose from an explicit concern to make protection in the commodities

> field as strong as it was in the securities field, lest the unscrupulous would simply transfer their operations from one market to another. H.R. Rep. No. 1522, 73d Cong., 2d Sess. 2 (1934); 78 Cong. Rec. 10446 (June 4, 1934) (Remarks of Chairman Jones of the House Committee on Agriculture); 79 Cong. Rec. 8589 (June 3, 1935) (same). ...Congress was not only aware of the implied right of action under the CEA in 1974 as shown below, but surely was also aware of the private right of action recognized in the analogous field of securities regulation.

See, also, Markham and Meltzer, Secondary Liability Under the Commodity Exchange Act, 27 Emory L.J. 1115 (1978); Note, Private Rights of Action for Commodity Futures Investors, 55 B.U.L. Rev. 804, 821-22 (1975).

D. The 1974 Amendments Are Comprehensible Only On The Assumption That A Private Cause Of Action Exists.

The 1974 revisions are comprehensible only if private causes of action are available under the CEA. In transferring

responsibility for administration of the CEA from the Department of Agriculture to the CFTC, Congress also made a major change in the regulatory authority vis-a-vis the commodity exchanges. Prior to 1974, the exchanges purportedly regulating commodity trading were required to enforce only those of their rules not disapproved by the Department of Agriculture.

In the wake of private damage suits under the CEA, the exchanges were failing, even refusing, to promulgate regulations imposing duties on themselves and brokers because such regulations served to establish standards of care against which their conduct was measured. The 1974 revisions dealt with this problem by requiring the exchanges to enforce all rules mandated by the CFTC, § 5a(8), 7 U.S.C. § 7a(8), (A-57).

Congress could have dealt with the exchanges' self-serving failure to self-regulate by eliminating private causes of action, as the exchanges urged (A-60, 61). Congress did not do so; instead it enacted provisions complementary to - indeed, premised on - the existence of private causes of action.

Only by ignoring this important aspect of the legislative history was the Fifth Circuit in Rivers v. Rosenthal & Co., supra, able to conclude that, in amending the CEA in 1974, Congress opted for centralized agency regulation of the commodities futures industry and therefore eliminated the private cause of action. Rivers notwithstanding, there is no inconsistency between centralized agency regulation and private causes of action. The legislative history of the provisions strengthening the regulatory authority of the CFTC over the exchanges makes clear that Congress perceived no conflict in strengthening governmental authority and permitting private causes of action. If this Court were now to eliminate the private cause of action it would destroy a vital enforcement technique Congress deemed essential to protect investors and the commodity markets. Such a result would be thoroughly at odds with the thrust of this Court's recent decisions - respect for the proper roles of the legislative and the judiciary.

E. Congress Included Specific Statutory Language Designed To Preserve Private Causes Of Action.

Moreover, unlike the statute involved in Transamerica, supra, Congress, in reenacting the CEA, included language designed to preserve the rights of private parties to such redress in the courts. Responding to objections that, as originally proposed, the provision granting the CFTC exclusive jurisdiction over commodity futures would have stripped the federal and state courts of jurisdiction over cases arising from commodity transactions, the Senate Committee added language, codified in § 2(a)(1), 7 U.S.C. § 2, specifically preserving that jurisdiction. Of course, that section preserves the court's jurisdiction in cases other than ones like the one at bar; it also unambiguously preserves private causes of action.

The CFTC, the agency charged with enforcement of the statute, interpreted these provisions as giving it exclusive authority vis-a-vis other federal and state agencies, but not as ousting the courts of jurisdiction over private causes

of action. That interpretation, is , of course, entitled to great deference. Infra, at 28.

Judge Mansfield, (A-92,93), relying on the expressio unius maxim of statutory construction, would read the reparations remedy, created in 1974, (§ 14, 7 U.S.C. § 18) and the criminal provisions of the Act, (§ 9, 7 U.S.C. § 13), as barring an implied judicial one. As we will demonstrate, the reparation remedy was not intended as the only remedy for violations of the CEA. Expressio unius, however, is only an aid to statutory interpretation, not an inflexible rule of law, Transamerica, supra; Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 419-20 (1975); National Railroad Passenger Corp. v. National Assoc. Railroad Passengers, 414 U.S. 453, 458-61 (1974). It can be overcome by contrary evidence. Here, that contrary evidence included the provisions of § 2(a)(1), cited above, the change in the authority of the regulatory body and the frequent references in the legislative history to a private right of action (A-56).

F. Failing To Imply A Private Cause Of Action Would Frustrate The Congressional Scheme.

Under Cort v. Ash, supra, one of the questions which must be answered before a court may imply a remedy is whether a private remedy would interfere with the Congressional scheme, Cort v. Ash, supra, 422 U.S. at 78; National Railroad Passenger Corp. v. National Assoc. of Railroad Passengers, supra, 414 U.S. at 463. Not only is there no such conflict here, but a failure to permit the private cause of action would interfere with and seriously frustrate the Congressional scheme.

Congress originally enacted § 4(b) in 1936 in order to prevent swindlers who had previously engaged in stock frauds - recently prohibited by the Securities Act of 1933 and the Securities Exchange Act of 1934 - from moving into the commodities futures field. It therefore chose language identical with the broad prohibitory language which was so successful in reducing securities fraud. Any substantial difference between the two regulatory schemes would defeat this Congressional

purpose.[5] Over the years, both statutes were interpreted to permit private causes of action. For this Court to now eliminate the cause of action only under the CEA would undermine the Congressional intent to insure comparable investor protection under both acts.

G. Implying a Private Cause of Action Would Not Interfere with the Congressional Purpose.

The Petitioner Exchange and its officers argue that a private cause of action is inconsistent with the limitations on the financial sanctions that the CFTC can impose on exchanges under § 6b, 7 U.S.C., § 13a of the Act. Upon examination that argument fails.[6]

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[5] See discussion at pages 16-17 herein, supra, and Judge Friendly's fn. 14 (A-34).

[6] The Exchange suggests that, as a regulatory body, it is absolutely immune from damage suits. (No. 80-757 at 10). Unlike a government agency, which presumably acts on behalf of the public at large, the Exchange is organized by its members to advance their own business interests. Although perhaps not a profit making entity (Cf. New York Times, January 5, 1981 at p. D-1), it is governed by representatives of its members, who, it must be assumed, act to further their own interests.

The requirement that the CFTC consider an exchange's financial condition when imposing fines is consistent with the existence of private causes of action. Congress, concerned for the financial stability of the exchanges, and knowing that private suits could be brought, limited the power of the CFTC to impose penalties over and above compensatory damages which might be awarded for violations of the CEA. Moreover, the limitations are on a "per day", not "per incident" basis. Thus, even given the statutory limits, substantial fines can be imposed by the CFTC (A-29); they are however, only punitive and not remedial (A-70, n.35).

The Fifth Circuit found a conflict between a private cause of action and the Congressional decision to concentrate regulatory authority in the CFTC (JA-33, 34). It found that allowing for private causes of action would result in conflicting decisions under the CEA. Significantly, however, that section of the opinion makes no reference to Chicago Mercantile Exchange v. Deaktor, supra, in which this Court applied the doctrine of primary jurisdiction in a private lawsuit under the CEA as a means of avoiding precisely

this result.[7]

Finally, petitioners, on the most charitable reading of their motives, are not wholly disinterested in seeking to have the reparation remedy made exclusive. The CFTC reparations procedure is seriously backlogged, and the reparations section is not adequately staffed to handle the extra workload which would result if all complaints were forced into the reparations process (Commodity Futures Trading Commission, 1979 Annual Report, at 29).

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[7] Further proof that Congress did not intend for all commodity cases to be tried in one agency, in order to create a uniform body of law, is to be found in § 5a(11) of the CEA, 7 U.S.C. § 7a(11) which requires that commodity brokers provide for arbitration. The arbitrators are not employees of the CFTC or otherwise subject to its control.

Moreover, Congress did not require that all appeals from CFTC determinations be heard in one court, as it has done in other statutes.

The CFTC, as did the Department of Health, Education & Welfare in Cannon, supra, has candidly admitted that it is not equiped to police all commodity related transactions. See Amicus Brief of the Commodity Futures Trading Commission to the United States Court of Appeals for the Second Circuit, at p. 34:

> Similarly, the Commission is an agency with limited resources which are insufficient to permit it to police all commodity - related transactions, let alone to decide expeditiously all reparation complaints.

With this in mind, the CFTC has consistently taken the position that the 'exclusive jurisdiction' given to it does not preclude the institution of suits in federal courts.

The Commission initially stated its position as follows, in 41 Fed. Reg. 18,471 (1974):

> [P]rivate litigation seeking damages for alleged violations of provisions of the Act will rarely, if ever, involve issues appropriate for review by the Commission under the doctrine of primary jurisdiction. The judicial resolution of a private fraud action, for example, requires only the application of

> specific statutory standards to the particular conduct alleged. The issues raised by a particular fraudulent scheme, however complicated, are entirely within the conventional ability of the courts to resolve and should therefore not occasion referral to the Commission. If a court wishes the Commission to express its view on questions of law raised in litigation, it may request the Commission's participation as amicus curiae...

This view of the statute, adopted soon after its enactment by the agency changed with its enforcement, is entitled to great deference. E.g. U.S. v. Consumer Life Ins. Co., 430 U.S. 725 (1977): Chemehuevi Tribe of Indians v. Federal Power Commission, 420 U.S. 395 (1975).

H. The Opinion Below Adequately Considered the Remaining Cort Factors.

As Judge Friendly noted, the remaining Cort factors also support the implication of a private right of action (A 47, A-87). The regulation of commodity markets has been a federal matter since 1922. At least one court has held that the state courts have been preempted from determining common law claims of fraud arising from commodity futures

trading. See International Trading Ltd. v. Bell, 262 Ark. 244, 556 S.W.2d 420 (Ark. 1977), cert. den., 436 U.S. 956 (1978).

Commodity speculators were amongst the "especial" class for whom Congress acted to protect. In 1974, Congress understood that speculators were a prerequisite to the adequate functioning of the commodity markets who warranted the Act's protection.

III. A DENIAL OF CERTIORARI WOULD NOT CREATE UNDUE HARDSHIP FOR PERSONS IN PETITIONERS' POSITIONS

The petitions for certiorari argue that, unless the Court decides now whether a cause of action exists under the CEA, it is probable that the "district courts will accept the existence of a cause of action for damages against contract markets as established[ ]", and "delineat[e] the precise contours of the private cause of action". (petition for certiorari of the Exchange, No. 80-757 at 11).

The result is said to be potential liabilities, whether through adjudication or settlement "in millions of dollars." Petitioners apparently believe that any such liabilities would clearly be unjustified.

This case shows otherwise. The sanctions imposed by the CFTC against Simplot and Taggares and the penalties rendered by petitioner Exchange against petitioners-brokers make it clear that the conduct complained of was wrongful.

In any event, the fear of strike suits may be reason not to expand upon the

standing of persons able to assert a cause of action, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), or to require a greater showing by persons seeking to establish a cause of action (Securities & Exchange Commission v. Texas Gulf Sulphur Co. 401 F.2d 833, 867 (2nd Cir. 1968) (Friendly, J. concurring), cert. den. sub nom. Coates v. Securities & Exchange Commission, 394 U.S. 976 (1969); Smith v. Groover, 468 F.Supp. 105 (N.D. Ill. 1979)). It is not, however, a reason to abolish respondents' Congressionally recognized private cause of action.

The courts will, as petitioners suggest, undoubtedly grapple with the questions of causation and limitations in damages. Precisely because these questions have not been answered, petitioners' claims about the possibility of strike suits are premature.

The decision below is not the first to allow a suit under the CEA; the first reported suit under the CEA dates to 1967. Petitioners point to no evidence that such suits are usually, or even frequently, unfounded. Indeed, they make no claim that they, or others, have been victims of strike suits under the CEA. All they say

is that a significant number of suits have been brought under the Act.

A more reasonable interpretation of the facts offered by petitioners is that despite the existence of the CFTC, there remains a continuing need for private damage suits to remedy illegal and fraudulent practices and to make those who are the victims of such practices whole.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

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